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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-795

RODOLFO MEDINA-HERRERA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY MEMORANDUM FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A12) is reported at 606 F.2d 770.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1979. A timely petition for rehearing was denied on October 26, 1979 (Pet. App. A13-A14). The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Sixth Amendment [right to counsel] rights were violated where his retained counsel also represented two (2) co-indictees within the same federal conspiracy indictment and . . . where the court made absolutely no inquiry as to the possibility of prejudice?

1A. Whether the Sixth Amendment right to effective assistance of counsel was violated by the mere possibility, however remote, that a conflict of interest may exist? (Cf., *Cuyler v. Sullivan*, cert. granted, ... U.S. ....., ... S.C. ....., 26 CrL 4002 (1979)?

1B. Whether the Court of Appeals erred in applying the wrong standard as relating to Sixth Amendment conflict of interest [burden on defense counsel to ascertain conflict as opposed to duty upon the trial court to make inquiry where same counsel represented three (3) co-indictees under the same conspiracy indictment]?

1C. Does *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173 (1978), require reversal where prejudice is shown and the trial court made absolutely no inquiry on the subject of conflict of interest?

1D. Whether the above questions require particularly close scrutiny where [as here] neither the petitioner nor the co-indictees spoke English?

1E. Whether certiorari is appropriate to review the Sixth Amendment question in this case where the court below made absolutely no inquiry as to "conflict of interest", particularly in light of the lack of uniformity in the circuits on this question and in light of certiorari being granted in *Cuyler v. Sullivan*, 26 CrL 4002 (1979)?

2. Whether the Double Jeopardy Clause of the Fifth Amendment precluded petitioner from being convicted on retrial . . . where a new trial had been granted based upon the government's closing argument during petitioner's first trial where the trial judge stated: "Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out" (and, post-trial, the trial judge granted a new trial solely on the ground of prosecutorial misconduct during closing argument)?

2A. Whether, under such circumstances, was there such deliberate prosecutorial overreaching so that the Double Jeopardy Clause barred retrial?

ARGUMENT

(A)
CONFLICT OF INTEREST

The government suggests, *inter alia*, that:

> "The Court may wish to hold this case pending the decision in *Cuyler v. Sullivan* [78-1832], and to dispose of it in light of the decision in that case" (Gov. Brf. Opp., pg. 9, 12).

Petitioner has pointed out that almost every Circuit, save for the Seventh Circuit, require[d] the TRIAL JUDGE to make inquiry of the defendant[s] regarding the evil where a single attorney represents multiple defendants before the court (e.g., *U.S. v. Donahue*, 560 F.2d 1039 at 1042-44 (C.A. 1, 1977); *U.S. v. Carrigan*, 543 F.2d 1053 at 1055 (C.A. 2, 1976); *Sullivan v. Cuyler*, 593 F.2d 512 (C.A. 3, 1979) (cert. pending . . . 78-1832); *U.S. v. Levy*, 577 F.2d 200 (C.A. 3, 1977); *U.S. v. Truglio*, 493 F.2d 574 at 579 (C.A. 4, 1974); *U.S. v. Alvarez*, 580 F.2d 1251 at 1257 (C.A. 5, 1978); *U.S. v. Lawriw*, 568 F.2d at 102 (C.A. 8, 1977)).

The government points out that courts have reviewed the Sixth Amendment question by inter-changing several words. The government points out that courts have frequently used "potential, possible and actual" while discussing conflict of interest (Gov. Brf. Opp., pg. 9, n.4). This, the government points out, "may generate unnecessary confusion" (ibid).

What petitioner stresses [and the government does not deny] is that the erroneous Seventh Circuit view has been perpetuated since *U.S. v. Mandell*, 525 F.2d 671 (C.A. 7, 1975). *Mandell* put the onus of inquiry . . . NOT

ON THE TRIAL COURT . . . BUT ON DEFENSE COUNSEL. In the present case the Seventh Circuit stated:

> "More important, however, is that the defense counsel to whom WE HAVE ENTRUSTED THE PRIMARY RESPONSIBILITY IN THIS AREA, see *MANDELL, SUPRA*, 525 F.2d at 677, NEVER ALERTED THE DISTRICT COURT IN ANY WAY TO POSSIBLE PROBLEMS WITH JOINT REPRESENTATION" (606 F.2d at 776; emphasis ours).[1]

The *pure* question which *Holloway* seemingly left open and which may now be appropriately answered within the parameters of this federal criminal case is:

> ". . . Second, courts have differed with respect to the scope and nature of the *affirmative duty of the trial judge* to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests . . ." (*Holloway*, 435 U.S. 475, 98 S.Ct. at 1178).

Succinctly, the record below shows that a single defense counsel represented three (3) separate defendants in the Federal District Court in Chicago, Illinois under Indictment 77 CR 900. One defendant, Lopez, was a fugitive during petitioner's first trial [February, 1978]. Petitioner stood trial commencing February 14, 1978, while counsel's third client in the same case entered a guilty plea before the same trial judge on the same date. The record reflects *clearly* that defense counsel's third client in this case, Alcantar, the guilty pleading defendant, was a potential trial witness (O.R. 25). We

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[1] Another example of the Seventh Circuit's perpetuation of erroneous constitutional doctrines is found in *Beckwith v. U.S.*, 425 U.S. 341, 96 S.Ct. 1612 at 1614, n. 2 (1976). In *Beckwith* this Court pointed out that the Seventh Circuit, alone, required certain *Miranda* warnings in non-custodial I.R.S. situations (Opinion by Chief Justice Burger).

also point out that at the February, 1978 trial [Trial I] three (3) of the four (4) counts upon which petitioner was being tried were the subject of judgment(s) of acquittal at the close of the government's evidence (O.R. 33). Thus, the jury was deliberating on the remaining conspiracy count under which petitioner and his attorney's two (2) other clients . . . were both charged (O.R. 2). We submit, *aliunde*, that the circumstances described compelled an independent inquiry from the trial judge on conflict of interest.[2] The appropriate A.B.A. Standard states:

ABA, Standards Relating to the Administration of Criminal Justice—The Function of the Trial Judge § 3.4(b), at 171 (1974):

> "Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

The Court of Appeals while affirming petitioner's conviction did not so much as pay lip service to the A.B.A. Standard (606 F.2d at 776) although even the dissenting Justice in *Holloway* urged:

> I would follow the lead of the several Courts of Appeals that have recognized the trial court's duty of inquiry in joint representation cases without minimizing the constitutional predicate of "conflicting interests."[3] (435 U.S. at 475, 98 S.Ct. at 1184).

[2] The potential for prejudice is thus greater by virtue of the court dismissing three (3) of the four (4) counts against the petitioner. Stated otherwise, the government's evidence could not reach any suggested overwhelming status. We point this out notwithstanding the statement in *Glasser*:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial", 315 U.S. at 75-76.

We note, finally, that both petitioner and his co-defendant at trial [*albeit* entering a guilty plea] Alcantar, both needed an interpreter throughout the proceedings. It may be [that as this record reflects] that the added ingredient of non-English speaking defendants raise the level of necessary inquiry by the trial court when, as here, we are considering a precious constitutional mandate [Sixth Amendment right to counsel].

(B)

DOUBLE JEOPARDY QUESTION

With unmistakeable clarity the trial court told government counsel (Mr. Cook, Esq.) what he thought of part of the government's closing argument at an immediate sidebar following the offensive remarks:

> THE COURT: I think, Mr. Cook, that you came close to committing reversible error.
>
> *Although I am going to deny the motion, I think you deliberately tried to prejudice the jury by bringing this out.* Counsel didn't argue it.
>
> But, I am going to deny the motion at this point, and we can reconsider it at a later time during post-trial motions.
>
> If you can present some cases on it—I don't know— but I am going to deny it at this point. (Tr. 10-11, February 21, 1978)

On May 31, 1978, petitioner was granted a new trial only on the grounds of the government's prejudicial

[3] Mr. Justice POWELL with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

closing argument (O.R. 46). While granting a new trial [some three (3) months later] the trial court stated:

> With respect to the other question as concerning the prejudicial effect of the argument of counsel, I take a different position. It seems to me that after reading the cases and also the transcript in this case—which I did very carefully—it would be futile to take this case to the appellate court because I just think it would result in a reversal, and therefore I am going to grant a new trial to be held immediately—as quickly as possible—concerning this defendant.[4]

Under such circumstances this Court in *Arizona v. Washington*, stated:

> "As this Court noted in *United States v. Dinitz*, 424 U.S. 600, 611, 96 S.Ct. 1975, 1081, 47 L.Ed.2d 267:
>
> > "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. *It bars retrials where "bad-faith conduct by judge or prosecutor* '. . . threatens the '[h]arassment of an accused by successive prosecutions of declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."
>
> Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to *achieve a tactical advantage over the accused.*" (98 S.Ct. at 831-32; ft.nts. omitted; emphasis ours)

[4] Transcript of May 31, 1978. This date [May 31, 1978] becomes interesting in that defense counsel's second client, Alcantar, is sentenced by the same trial judge to eight (8) years in custody on the same date. The separate transcripts of proceeding were supplemented to the original record in the Seventh Circuit.

The trial court ameliorated his earlier comments while denying post-conviction relief on September 14, 1978 (O.R. 64). Nevertheless, it is petitioner's view that the spontaneous comments by the trial court reflected a proper characterization of that which occurred at the time it happened. The government offers no citation to authority suggesting that the trial court's spontaneous remarks were less than accurate (Gov. Brf. Opp., pg. 12, n.6).

We also note that *the government* found that the Court of Appeals in this case committed error while equating for double jeopardy purposes, petitioner's motion for a new trial and the mistrial involved in *Dinitz* (Gov. Brf. Opp., pg. 11, n.5). Once again, the government offers no citation to authority for suggesting that the Court of Appeals was in error while equating a motion for a new trial . . . with a motion for a mistrial. Quite to the contrary *Abney v. U.S.*, 431 U.S. 651 (1977) clearly implies that the relief sought is synonymous (in accord, *U.S. v. Martin*, 561 F.2d 135 (CA 8, 1977).

CONCLUSION

The petitioner, as to his argument regarding the conflict of interest in this case, urges that certiorari be granted in conjunction with *Cuyler v. Sullivan*, 78-1832. We thus adopt the government's alternative conclusion as set forth in their brief in opposition, pg. 12. Petitioner on his double jeopardy argument urges independent consideration for certiorari. Thus, petitioner urges that certiorari be granted to review both issues submitted.

Respectfully submitted,

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